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No. _____

In The

Supreme Court of the United States

October Term, 1996

RICHARD BENEDYKT PREUSS,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

Petition For Writ Of Certiorari
To The Court Of Appeal For The State Of California
Fourth Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER PETITIONER WAS DEPRIVED OF DUE PROCESS BY THE STATE COURT'S INSTRUCTIONS AND PROSECUTOR'S ARGUMENT WHICH IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF TO THE DEFENSE IN A CASE OF "TRANSITORY POSSESSION" BY REQUIRING HIM TO PROVE HE POSSESSED A SMALL QUANTITY OF A CONTROLLED SUBSTANCE TO DESTROY IT, RATHER THAN REQUIRING THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT HE POSSESSED IT FOR AN ILLEGAL PURPOSE, AS CONTROLLING STATE CASE LAW REQUIRED?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, RICHARD BENEDYKT PREUSS, respectfully prays that a writ of certiorari issue to review the decision of the California Supreme Court, affirming his conviction for state narcotic offenses. He was convicted of violating Califorina Health and Safety Code Sections 11377(a) and 11379(a), possession of methamphetamine and *transportation* of methamphetamine.

OPINION BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division One, considered and decided petitioner's direct appeal on the merits. Thereafter, the state Supreme court entered a brief order denying discretionary review, which had the legal effect of leaving the opinion of the Court of Appeal undisturbed. Both the order of the state Supreme Court and the opinion of the court of appeal are reproduced in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3). This case comes within that provision because it involves a final judgment rendered by the highest Court of one of the States and because Petitioner's rights under the Constitution of the United States are at issue. A petition for review in the state Supreme Court was timely filed, and the order denying the petition for review was filed on April 16, 1997. On July 7,

1996, the Honorable Associate Justice of this Court, Sandra D. O'Connor, denied Petitioner's application for an extension of time to file this Petition and counsel for Petitioner was informed by a member of the staff of the Clerk of this Court that this Petition was therefore due on Tuesday, July 15, 1997. This Petition is timely filed pursuant to Rule 13.4 of the Supreme Court rules.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, and California Health and Safety Code Section 11379(a), which prohibits and punishes as a felony the sale of narcotics, or the *transportation* of any quantity of a controlled substance, even if it is only possessed for personal use.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner seeks Certiorari to review the state court's rejection of two of the arguments he raised on appeal, and its determination that there was no error or constitutional violation.

In the trial (Superior) court he argued for jury instructions under established state law entitling him to an acquittal if the jury found his possession of the controlled substance involved was "solely for the purpose of

destruction" and such an instruction was given.[1] Nevertheless, as given, and under the objected to argument of the prosecutor, the defendant was saddled with the burden of negating general criminal intent, an essential element of the crimes charged, by proving that the purpose of his possession (and by implication his transportation) of the substance was solely for the purpose of destroying or discarding it. On Appeal, the Court of Appeal in a nonpublished case[2] failed to follow the law in prior published decisions regarding who bears the burden of proof, and held it was properly placed upon the defendant which violates his due process right to have the state prove each element of the crime charged beyond a reasonable doubt.

SUMMARY OF ARGUMENT

Despite giving the standard burden of proof instruction the standard state pattern jury instruction on transitory possession of drugs as a defense, the trial court never told the jury whose burden it was to prove or disprove the elements of that defense. The instruction is stated in terms of the need that "all of the following conditions are met" which clearly sounds as though the defendant must prove the four elements of the defense.

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[1] Although it was only given as to the lesser count of straight possession of the drug, not as to the *transportation* count.

[2] Which therefore did not change California law on the point.

In addition, the trial prosecutor argued as though the defendant had the obligation of proving to the jury that he did, in fact: have no ownership or right to control the substance; possessed it solely to abandon, destroy or dispose of it; did so to terminate the unlawful possession by Claudia; and did not do so to prevent the police from seizing it.[3]

When defense counsel objected to the prosecutor's statement "The People do have the burden of proof in this case, but the defense has undertaken to prove things to you that are plainly lies, * * * yet no character evidence has been presented to indicate that, no associates, no friends, no one was called to tell you that . . . " the court overruled the objection. The prosecutor capitalized on this ruling by following up with a suggestion that the defendant failed to "prove" these things because his testimony was not "confirmed" by other evidence.

> "No evidence of any kind has been presented to confirm defendant's hogwash."

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[3] The District Attorney's Argument, focused on whether or not defendant's testimony was corroborated, and how easy it would be to defend these charges if all that was required was the simple testimony of the defendant. ["Isn't this the easiest lie in the world, especially when its an uncorroborated lie, uncorroborated story? Who are these people? What are their names? Is there any way for law enforcement to verify his story without those names? Is there any way for you to evaluate it without him providing that information?"] And, when the prosecutor acknowledged his own burden or proof, he limited it to the elements of the crime, not to the issue of whether or not the possession was "transitory" under the defense instruction.

Under established federal constitutional interpretation, the due process clause is violated when the state shifts the burden of proof on an element of a crime to the defendant, and under published California precedent, it is the state which bears the burden of disproving the "transitory possession" defense, because it is not an affirmative defense, but if present it merely negates an element of the crime – general criminal intent.

REASONS FOR GRANTING THE WRIT AND ARGUMENT

Petitioner was convicted in the California Superior Court of possession and transportation of a very small quantity of methamphetamine. Under state law transporting even a small quantity sufficient only for personal use is punished the same as selling or offering to sell methamphetamine. In this case the defendant was at a concert when he acquired the methamphetamine by taking it away from a young person with the intent and for the purpose of disposing of it. He then drank a sufficient quantity of beer to become intoxicated and forgot the drug was in his jacket pocket. On the way home he was arrested for driving under the influence of alcohol, and in a routine search a very small quantity of methamphetamine was found in his pocket.

His trial defense was "transitory possession." He told the police that he is a record producer and that he met one of his performers and his female companion (Claudia) at the concert. He took the substance from her with the intent of destroying or disposing of it. Unfortunately,

he drank some wine at the concert and many drinks in a bar after the concert, and forgot to dispose of it prior to getting into his car and driving home to Los Angeles. His blood test showed only alcohol, and the officer that arrested him saw no signs of use of methamphetamine. He was tried on two counts: transportation of methamphetamine (Count 1) and possession of methamphetamine (Count 2).

As mentioned above, the trial court failed to properly instruct the jury that the state bears the burden of proving his possession (and by implication) his transportation of the small quantity of drug in this case was *not* innocent under a state rule that makes an exception to the crime of possession where, as defendant testified was the case here, he possessed it solely to destroy or discard it, and not to elude detection by the police, or for any other criminal purpose.[4]

Under *People v. Mijares*, 6 Cal.3d 415 (Cal. 1971), the genesis of CALJIC 12.06, the Court held the form of words that the jury should have been instructed in was, "possession prohibited by Section 11500 . . . does not include * * * ." This construction would have required the

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[4] A modified form of CALJIC 12.06 (1989 Rev.), the approved state pattern jury instruction on transitory possession was given in which the jury was told that possession of a controlled substance is *not unlawful* if (a) it is not based on ownership or the right to control; (b) it is possessed solely for the purpose of abandonment, disposal or destruction; (c) It is possessed in order to terminate the unlawful possession of the substance by another; (d) the possession is not to prevent imminent seizure by law enforcement.

People to prove the possession in the case before the jury was not the type mentioned in the instruction.

Similarly, in *People v. Cole*, 202 Cal.App.3d 1439, 1447 (CA 1988), the Court held the jury was improperly instructed on reasonable doubt in a transitory possession context when the trial court told the jury "if you have a reasonable doubt whether the defendant was handling the controlled substance for [non-culpable purposes] you must give him the benefit of this doubt and find him not guilty." This instruction was found to impermissibly shift the burden of proof to the defendant to offer evidence that raised a reasonable doubt, whereas it is clearly the People's burden to eliminate such a doubt as to this "transitory possession" as well as the usual elements of the crime.

The People's argument that the defendant's testimony must be believed before there was a reasonable doubt clearly suggested to the jury the defendant needed to shoulder the burden of raising a reasonable doubt, when, in fact, under *People v. Cole, supra,* the People had the burden of disproving transitory possession, beyond a reasonable doubt. Here, as in *Cole,* the trial court had the duty, *sua sponte,* to correct the instruction. (202 Cal.App.3d at p. 1446.)

This error alone violates the most basic allocation of the burden on the government under the principles of *In re Winship*, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068

(1970) and *Mullaney v. Wilbur*,[5] 421 U.S. 684, 700-702, 44 L.Ed.2d 508, 95 S.Ct. 1881, 520-522 (1975).

The evidence against Appellant in this case is consistent with that of an innocent person having no stake or interests in drug transactions. (Cf. *United States v. Penagos*, 823 F.2d 346, 349 (9th Cir. 1987).

CONCLUSION

For all these reasons, this Court is urged to grant the writ and reverse the judgment of the state Court of Appeal affirming Petitioner's conviction.

WHEREFORE, Petitioner prays that this Honorable Court grant his Petition and issue its Writ of Certiorari.

Respectfully submitted this 15th day of July, 1997.

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[5] Shifting the burden of proof to the defendant violates due process.

APPENDIX

OPINION OF CALIFORNIA FOURTH DISTRICT COURT OF APPEAL, DIVISION ONE

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RICHARD BENEDYKT PREUSS, Defendant and Appellant.	)	D023423 (Super. Ct. No. SCN013841)

APPEAL from a judgment of the Superior Court of San Diego County, David W. Ryan, Judge (Judge of the Municipal Court of the North County Judicial District sitting under assignment by the Chairperson of the Judicial Council). Affirmed.

A jury convicted Richard Benedykt Preuss of one count of transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)) and one count of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)).[6] The trial court imposed a three-year probation term.

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[6] Prior to his jury trial, Preuss pled guilty to a misdemeanor charge of driving while having .08 percent or more of blood alcohol content (Veh. Code, § 23152, subd. (b)).

Preuss appeals, contending the trial court erred by not ordering discovery of an internal District Attorney Office memo purportedly related to the issue of discriminatory prosecution. Preuss also contends the trial court made various instructional errors.

FACTS

At about 3 a.m. on October 18, 1994, San Diego County Deputy Sheriff Christopher Davis noticed Preuss's brown Isuzu Trooper weaving on Highway 101 in Del Mar and followed the vehicle. Davis observed the vehicle come to a complete stop at a green light. Suspecting that the driver was under the influence of alcohol, Davis indicated the driver should pull over.

Preuss initially denied he had been drinking, but later told Davis he had had one beer. Preuss, whom Davis described as "falling down drunk," failed the field sobriety tests and was placed under arrest.

Incident to the arrest, Davis searched Preuss and found a small plastic bag containing a yellow rock-like substance in his shirt pocket. Davis impounded the substance, which was .08 grams of methamphetamine. Preuss's blood alcohol level was .18 percent.

Preuss, who is a record producer, testified he had gone to a Rolling Stones concert, where he met a former client who was with a woman he described as "pretty much high" from drugs. Preuss stated he did not think it "was right for her to do so much of the narcotic," so he took the drugs away from her and was going to dispose of them. However, he later forgot to throw away the

methamphetamine because of the "excitement of the concert" and his drinking.

In 1987, Preuss had been convicted of felony possession of cocaine with intent to sell. That experience was "definitely quite a lesson" to him, and, consequently, he does not allow his clients to use drugs in his studio.

DISCUSSION

I

Discriminatory Prosecution and Discovery Request

Preuss sets forth a discriminatory prosecution theory, contending it was unfair for him to be charged with the transportation count (Health & Saf. Code, § 11379, subd. (a)) when the District Attorney's Office subsequently changed its policy to stop charging that offense where the quantity of drugs was minimal and strictly for personal use. Preuss assigns error to the trial court for rejecting his oral mid-trial discovery request to order the District Attorney to turn over to him an internal memo regarding the change in policy. Essentially, Preuss is arguing the trial court erred in denying his request to discover information concerning a purported discriminatory practice. (See *Murgia* v. *Municipal Court* (1975) 15 Cal.3d 286, 300-301.) For the reasons that follow, we find no error.

Initially, before a jury panel was called, counsel for Preuss moved to dismiss the transportation count on the basis of his understanding that the new District Attorney had "circulated a memo since the issuing of this case saying that personal use quantities would not be charged

by his office as transportation." The deputy district attorney replied that he had not seen any memo and in any event despite the small amount of methamphetamine, the transportation count was justified in this case because Preuss had previously been convicted of possession of drugs with intent to sell. The trial court denied the motion to dismiss.

On the morning of closing arguments, defense counsel revisited the issue by making an oral motion for discovery after the trial prosecutor had confirmed to him the existence of a memo outlining the new office policy of not charging a transportation count in cases involving a small amount of drugs. Defense counsel argued the court should secure a copy of the memo "for purposes of any appeal which might occur" because the memo would be relevant to the issue or "vindictive and selective prosecution." The trial court declined to order the District Attorney's Office to turn over the memo, noting, among other things, that in making the oral discovery motion, counsel had not complied with the noticed motion provisions for discovery under Proposition 115.

The elements of the defense of discriminatory enforcement were set forth in *Murgia* v. *Municipal Court, supra,* 15 Cal.3d 286. To establish the defense, the defendant must prove: (1) "he has been deliberately singled out for prosecution on the basis of some invidious criterion," and (2) "the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities." (*Id.* at p. 298, fn. omitted.)

In *Murgia* v. *Municipal Court, supra,* 15 Cal.3d at page 291, defendant members of the United Farm Workers

Union (UFW) were charged with various misdemeanors (e.g., malicious mischief, driving without a license) while engaged in activities on behalf of the UFW. The defendants introduced more than 100 affidavits detailing numerous instances of discriminatory conduct toward UFW members and their supporters on the part of Kern County law enforcement agents. (*Ibid.*) The discriminatory conduct by law enforcement agents included a ratification and encouragement of violent assaults committed by agents of the growers, members of a rival union and "private security groups" against picketing UFW members; these assaults took place in the immediate presence of sheriffs' deputies who took no steps to prevent such assaults or to arrest the assaulting individuals and sometimes arrested the UFW victims of such assaults. (*Id.* at p. 292.) Also, in their affidavits in support of their discovery motion, the defendants alleged participation by high level law enforcement authorities in a discriminatory enforcement scheme. (*Ibid.*) The Supreme Court held defendants' allegations were "clearly sufficient to support a claim of invidious discrimination which is prima facie invalid under the equal protection clause" (*id.* at p. 301) and therefore denial of the defendants' discovery motion was error (*id.* at p. 306).

Traditional discovery principles are applicable to the defense of discriminatory prosecution; defendants may be permitted to discover information regarding such a claim. (*People* v. *Moya* (1986) 184 Cal.App.3d 1307, 1310.) The standard of review for a ruling on a motion to compel discovery in such instances is abuse of discretion. (*People* v. *Ashmus* (1991) 54 Cal.3d 932, 979.)

There was no abuse of discretion in denying the discovery request here. "[T]he party moving to compel discovery must provide, inter alia, a 'plausible justification' for the information and/or material he seeks. [Citations.]" (*People* v. *Ashmus, supra,* 54 Cal.3d at pp. 979-980.) Preuss did not do this. To support the discovery claim under *Murgia* v. *Municipal Court, supra,* 15 Cal.3d at page 298, Preuss had to show he had been singled out on the basis of some invidious criterion. All he did was proffer that there was a change in office policy. The prosecutor pointed out to the court that regardless of any new office policy, Preuss would have been charged with the transportation count even though the amount of drugs was small because he had a prior conviction for possession with intent to sell. On this record, it was reasonable for the trial court to conclude that Preuss had failed to demonstrate under *Murgia,* that the transportation count was the product of prosecutorial practices that were "arbitrary and capricious or invidiously discriminatory." (*People* v. *Ashmus, supra,* 54 Cal.3d at p. 980.) "[A]n equal protection violation does not arise whenever officials 'prosecute one and not [another] for the same act' [citation]; instead, the equal protection guarantee simply prohibits prosecuting officials from purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis." (*Murgia* v. *Municipal Court, supra,* 15 Cal.3d at p. 297.) We find no abuse of discretion in denying the discovery request.[7]

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[7] Preuss argues the trial court erred in relying upon the discovery rules of Proposition 115 because the right to discovery of discriminatory prosecution practices is a constitutional principle that is not governed by Proposition 115

II

Instructions On Transitory Possession Defense

With respect to the defense of transitory possession, the trial court gave the following 1989 revision of CALJIC No. 12.06 as modified:

> "The possession of a controlled substance is not unlawful where all of the following conditions are met:
>
> "1. The possession is based on neither ownership nor the right to exercise control over the controlled substance,
>
> "2. The controlled substance is possessed solely for the purpose of abandonment, disposal or destruction,
>
> "3. The controlled substance is possessed for the purpose of terminating the unlawful possession of it by another person or preventing another person from acquiring possession of it, and
>
> "4. Control is not exercised over the controlled substance for the purpose of preventing its imminent seizure by law enforcement.

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discovery rules. (See Pen. Code, § 1054, subd. (e).) We need not concern ourselves with this argument. We review the trial court's action, not the reasons for its action. (See *Davey* v. *Southern Pacific Co.* (1897) 116 Cal. 325, 329 ["No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion."]; see also *People* v. *Evans* (1967) 249 Cal.App.2d 254, 257.)

> "Length of time of possession is one of the factors that may be considered in deciding whether the defendant physically handled the substance solely of abandonment, disposal, or destruction.
>
> "The law does not demand action within a specified time frame."[8]

Preuss contends the trial court's instruction on his transitory possession defense was misleading and/or erroneous in various areas: (1) regarding the burden of proof; (2) how the jury should view motive; (3) regarding the length of time of possession; and (4) by not extending the defense to the transportation count. We shall consider these assignments of error seriatim after briefly recounting the history of the defense and CALJIC No. 12.06.

A. *History of Defense*

In *People* v. *Mijares* (1971) 6 Cal.3d 415, 419, the Supreme Court carved out the defense of "momentary" or temporary possession for purposes of disposal. The defendant, who removed some heroin and paraphernalia from his unconscious friend's pocket and immediately threw it away in a field, was convicted of possession of heroin. (*Id.* at pp. 417-419.) The Supreme Court reversed, holding the jury should have been instructed "that the possession prohibited by section 11500 of the [Health &

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[8] The trial court added the last paragraph, which is not part of the standard CALJIC instruction, at the request of defense counsel and with the concurrence of the prosecutor.

Safety] code does not include merely handling for only brief moments prior to abandoning the narcotic." (*Id.* at p. 423.)

People v. *Mijares, supra,* 6 Cal.3d 415, led to the drafting of the initial version of CALJIC No. 12.06, "Momentary Possession As Not Unlawful." (*People* v. *Hurtado* (1996) 47 Cal.App.4th 805, 810.)[9]

In *People* v. *Cole* (1988) 202 Cal.App.3d 1439, 1442, the defendant claimed he had taken cocaine away from his teenage daughter and placed it in his safe while he and his wife decided how to dispose of it; the next day, police found it in the safe. The Court of Appeal (Second Dist., Div. Six) reversed, concluding the holding of *Mijares* "is not limited to possession for 'brief moments' only, but that possession of illegal drugs *solely for the purpose of disposal* does not constitute unlawful possession." (*People*

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[9] The initial version of CALJIC No. 12.06 reads:

"The possession of a[n] [item] [controlled substance] [marijuana] is not unlawful where all of the following conditions are met:

"1. The possession is momentary and based on neither ownership nor the right to exercise control over the [item] [controlled substance] [marijuana],

"2. The [item] [controlled substance] [marijuana] is possessed in furtherance of its abandonment or destruction,

"3. The [item] [controlled substance] [marijuana] is possessed for the purpose of terminating the unlawful possession of it by another person or preventing another person from acquiring possession of it, and

"4. Control is not exercised over the [item] [controlled substance] [marijuana] for the purpose of preventing its imminent seizure by law enforcement."

v. *Cole, supra,* 202 Cal.App.3d at p. 1445, italics in original.)

As a result of *Cole,* CALJIC No. 12.06 was revised in 1989 and renamed "Possession-Not Unlawful."

Meanwhile, in *People* v. *Sullivan* (1989) 215 Cal.App.3d 1446, 1452, this court visited the issue and concluded that the expansion of the *Mijares* defense by the *Cole* court was unwarranted.

> "We think the *Cole* court, by abandoning the requirement the possession be 'fleeting,' has unreasonably expanded the *Mijares* rule. *Mijares's* rule arose from a situation involving a fleeting, de minimis possession and reflexive act of abandonment. The Supreme Court's holding was that this de minimis possession and reflexive response was to a criminal possession[.] [T]his rule is one which is an understandable and simple rule. *Cole* complicates the rule by bringing in inquiries into the defendant's subjective intent in possessing the contraband. These inquiries are not suggested by *Mijares* or supported by the language of the statute. *Mijares's* focus was on the fleeting nature of the possession (during the instant of abandonment), not on the subjective mental state of the defendant. The statute makes possession illegal without regard to the specific intent in possessing the substance. We conclude the *Cole* court misinterpreted the *Mijares* decision and erred in deleting the 'momentary' possession requirement. We therefore decline to follow *Cole,* preferring instead to apply pure *Mijares.*" (*People* v. *Sullivan, supra,* 215 Cal.App.3d at p. 1452; accord, *People* v. *Hurtado, supra,* 47 Cal.App.4th at p. 814 [carrying firearm charges].)

As a result of *Sullivan*, the Use Note to the 1989 revision of CALJIC No. 12.06, observes "there is a split in appellate authority" and the trial court should choose between the original version and the 1989 revision, which is based upon *Cole*.

Here, the parties agreed to the 1989 revision as modified, and the trial court instructed accordingly. Based upon our decision in *Sullivan*, we do not think this instruction should have been given and had the trial court chosen the alternative – the original CALJIC No. 12.06 (see fn. 4, *ante*), we would not find error.[10] However, that is not the issue before us. Preuss has assigned error to the instruction as given and with this background in mind, we shall address his arguments.

B. *Burden of Proof*

Even though the trial court instructed the jury regarding the prosecution's burden of proof pursuant to CALJIC No. 2.90, Preuss argues the court had a sua sponte duty to modify the 1989 revision of CALJIC No. 12.06 to indicate that the prosecution had the burden of disproving the defense of temporary possession beyond a

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[10] In *McCallum* v. *McCallum* (1987) 190 Cal.App.3d 308, 315, footnote 4, the Court of Appeal addressed the issue of what a trial court should do when faced with conflicting decisions by Courts of Appeal: "As a practical matter, a superior court ordinarily will follow an appellate opinion emanating from its own district *even though it is not bound to do so.* Superior courts in other appellate districts may pick and choose between conflicting lines of authority. This dilemma will endure until the Supreme Court resolves the conflict, or the Legislature clears up the uncertainty by legislation." (Italics added.)

reasonable doubt.[11] The argument is without merit because Preuss's underlying premise that the prosecution had the burden of proof with respect to the defense is wrong.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." [*In re Winship* (1970) 397 U.S. 358, 364.] The state, however, "may allocate the burden of persuasion to a criminal defendant through the device of an affirmative defense." (*People* v. *Fuentes* (1990) 224 Cal.App.3d 1041, 1044.) Temporary possession as expanded by the *Cole* court is in the nature of an affirmative defense; accordingly, Preuss had the burden of producing evidence with respect to that defense. This rule shifting the burden of proof to the defendant is "supported by the rule of necessity and convenience which provides that the burden of proving an exonerating fact may be imposed on a defendant if its existence is 'peculiarly' within his personal knowledge and proof of its nonexistence by the prosecution would be relatively difficult or inconvenient." (*In re Andre R.* (1984) 158 Cal.App.3d 336, 342.)

Preuss's burden of proof argument relies on language in *People* v. *Cole, supra,* 202 Cal.App.3d at page 1447. That reliance is misplaced. We have already discussed our doubts about the wisdom of *Cole.* (See also *People* v. *Sullivan, supra,* 215 Cal.App.3d 1446.) In any event, the

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[11] Solely for the purpose of assessing this argument, we shall assume that an expanded version of *Mijares* was properly applied in this case.

Court of Appeal in *Cole*, disapproved of specific language regarding the burden of proof in the special instruction given in that case; the *Cole* court's holding on instructional error regarding the burden of proof does not apply here.

There was no instructional error with respect to the burden of proof.

C. *Motive*

The trial court gave the standard instruction on motive, CALJIC No. 2.51.[12] Preuss contends this was prejudicially misleading because the instruction allowed the jury to conclude that motive was not an element of the charged crimes. The motive instruction was not misleading; it merely allowed the jury to consider motive as a circumstance in the case. There was no error in giving the instruction; Preuss is wrong because he mistakenly relies on the erroneous reasoning of *People* v. *Cole*, *supra*, 202 Cal.App.3d 1439, for his underlying premise that the purpose of possession is an element of the crime. Neither the "subjective intent in possessing the contraband," nor motive is an element of these crimes. (*People* v. *Sullivan*, *supra*, 215 Cal.App.3d at p. 1452.)

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[12] The jury was instructed as follows: "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled."

There was no error in giving the standard motive instruction and it was not misleading.

D. *Length of Possession*

Preuss contends the modified version of CALJIC No. 12.06 (1989 rev.) discussing the length of time of possession as a factor for consideration was misleading because it allowed the prosecutor to argue that Preuss held on to the drug for too long for his transitory possession defense under *People* v. *Cole, supra,* 202 Cal.App.3d 1439. We disagree.

Preuss is essentially framing his unhappiness with the prosecutor's closing argument as instructional error. There was neither improper argument nor prejudicial instructional error. The length of time factor is part of the 1989 Revision to CALJIC No. 12.06, which allows the jury to consider length of time in determining whether the defense applies. Choosing to give this version of CALJIC No. 12.06 over the original version, of course, benefited Preuss because it reflected the expanded defense promulgated by the *Cole* court. Moreover, the trial court modified the instruction – at the request of defense counsel – by adding the final paragraph stating there was no specific time limit; this too benefited Preuss. Preuss's argument that he was prejudiced by the discussion of length of time of possession in the modified CALJIC No. 12.06 (1989 rev.) is disingenuous.

E. *No Extension of Instruction to Transportation Count*

Preuss contends it was error not to further modify the 1989 version of CALJIC No. 12.06 to extend the transitory possession defense to the transportation count. Preuss is mistaken.

Neither the momentary or fleeting possession defense of *Mijares* nor the expanded transitory possession defense of *Cole* applies to the crime of transporting drugs. The crimes of possession and transportation are not interchangeable. "[W]hile 'possession is commonly a circumstance tending to prove transportation, it is not an essential element of that offense and one may "transport" marijuana or other drugs even though they are in the exclusive possession of another.' " (*People* v. *Watterson* (1991) 234 Cal.App.3d 942, 945, quoting *People* v. *Rogers* (1971) 5 Cal.3d 129, 134.) Certainly, this court, which has rejected the expanded defense espoused by the *Cole* court, is not inclined to further expand the defense to encompass the crime of transportation as well as the crime of possession.

There was no sua sponte duty to modify CALJIC No. 12.06, as Preuss urges, to encompass the transportation count.

III

Failure to Instruct on Admissions and Corpus Delicti

Preuss contends the trial court committed prejudicial error when it failed to instruct the jury (1) to view oral admissions with caution, and (2) that the corpus delicti of an offense must be proved independently of admissions.[13] We agree that it was error not to so instruct; however, we find the error was not prejudicial.

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[13] CALJIC No. 2.70 reads:

"A confession is a statement made by a defendant other than at [his] [her] trial in which [he] [she] has acknowledged [his] [her] guilt of the crime(s) for

It is well settled that the trial court has a duty to instruct the jury sua sponte that the corpus delicti must be proved independently of admissions and that evidence of oral admissions must be viewed with caution. (See, e.g., *People* v. *Beagle* (1972) 6 Cal.3d 441, 455.) However, failure to give these instructions "does not constitute

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which such defendant is on trial. In order to constitute a confession, such a statement must acknowledge participation in the crime(s) as well as the required [criminal intent] [state of mind].

"An admission is a statement made by [a] [the] defendant other than at [his] [her] trial which does not by itself acknowledge [his] [her] guilt of the crime(s) for which such defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence.

"You are the exclusive judges as to whether the defendant made a confession [or an admission], and if so, whether such statement is true in whole or in part. If you should find that the defendant did not make the statement, you must reject it. If you find that it is true in whole or in part, you may consider that part which you find to be true.

"[Evidence of an oral confession [or oral admission] of the defendant should be viewed with caution.]"

CALJIC No. 2.72 (1989 rev.) reads:

"No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any [confession] [or] [admission] made by [him] [her] outside of this trial.

"The identity of the person who is alleged to have committed a crime is not an element of the crime [nor is the degree of the crime]. Such identity [or degree of the crime] may be established by [a] [an] [confession] [or] [admission]."

reversible error if upon a reweighing of the evidence it does not appear reasonably probable that a result more favorable to defendant would have been reached in the absence of the error." (*Ibid.*)

Here, the admissions at issue in this appeal are the statements Preuss made to the arresting officer that he knew there was methamphetamine inside his pocket. We find the failure to give each of these instructions was harmless.

As to the failure to provide an admissions instruction, we note the trial court did instruct the jury pursuant to CALJIC No. 2.13, which allowed the jury to consider Preuss's prior statements, which were consistent with his trial testimony, for purposes of credibility and as evidence of the truth of the facts he admitted. Preuss argues there was prejudice because there was no evidence beyond his statements that he knew there was methamphetamine in his pocket. We disagree. Contraband found inside one's clothing constitutes circumstantial evidence of knowledge. (*People* v. *Millum* (1954) 42 Cal.2d 524, 528-529; *People* v. *Flores* (1957) 155 Cal.App.2d 347, 349.) Moreover, Preuss had previously been convicted of possession of cocaine for sale, which tended to show he knew about illegal drugs. The prior conviction and the location of the methamphetamine amply supported a finding that Preuss had the requisite knowledge. In our view, it is not reasonably probable the jury would have reached a more favorable verdict had an admissions instruction been given. (See *People* v. *Watson* (1956) 46 Cal.2d 818, 836.)

As to the failure to provide a corpus delicti[14] instruction, we note the error is harmless where the evidence gives rise to a "reasonable inference" that the crime occurred. (*People* v. *Lara* (1994) 30 Cal.App.4th 658, 676.) As discussed above, there was ample circumstantial evidence that Preuss knowingly had methamphetamine in his pocket. Moreover, during Preuss's testimony *at trial* he admitted he knew he had methamphetamine in his pocket. Thus, there was sufficient evidence independent of the admissions Preuss made to the arresting officer that he had the requisite knowledge; the failure to instruct on the corpus delicti rule was harmless. "Omission of CALJIC No. 2.72 is harmless where the corpus delicti is clearly established by evidence independent of the admissions." (*People* v. *Daly* (1992) 8 Cal.App.4th 47, 59, citing *People* v. *Beagle, supra,* 6 Cal.3d at p. 456.) The failure to instruct on the corpus delicti rule was harmless under the *Watson* standard.

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[14] The corpus delicti of a crime consists of (1) the fact of the injury, loss or harm, and (2) the existence of a criminal agency as its cause. (1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) § 136, p. 152.)

DISPOSITION

Judgment affirmed.

/s/ Haller
HALLER, J.

WE CONCUR:

/s/ Benke
BENKE, Acting P.J.

/s/ McIntyre
McINTYRE, J.

ORDER OF CALIFORNIA SUPREME COURT
DENYING DISCRETIONARY REVIEW

Fourth Appellate District, Division One,
No. D023423 S059151

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

RICHARD BENEDYKT PREUSS, Appellant

Appellant's petition for review DENIED.

GEORGE
Chief Justice

CALIFORNIA HEALTH AND SAFETY CODE SECTION 11377(a)

"[E]very person who possesses [methamphetamine] . . . shall be punished by imprisonment in the county jail for a period of not more than one year or the state prison [for 16 months, 2 or 3 years]."

CALIFORNIA HEALTH AND SAFETY CODE SECTION 11379(a)

"[E]very person who transports, imports into this state, sells, manufactures, compounds, furnishes, administers, or gives away, or offers to transport, import into this state, sell, manufacture, compound, furnish administer, or give away, or attempts to import into this state or transport [methamphetamine] . . . shall be punished in the state prison for a period of two, three or four years."